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Supreme Court U.S.
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No.

IN THE

Supreme Court Of The United States

October Term, 1986

RANDOLPH COUNTY,
Petitioner,

vs.

ALABAMA POWER COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a county has a federally protected right cognizable under 42 USC §1983 which it may assert against a private corporation acting under color of state authority which condemns public property without paying just compensation.

2. Whether the dominant sovereign authority principle abrogates a county's federally protected right (within the meaning of 42 USC §1983) to just compensation guaranteed under the United States Constitution and the Constitution of the State of Alabama when a private corporation condemns a county's roads and bridges without paying just compensation.

3. In view of the fact that a county's right to just compensation for the taking of its property is protected by the Fifth Amendment to the United States Constitution and by two separate provisions of the Alabama State Constitution, does the dominant sovereign authority principle forbid the county's assertion of a 42 USCA §1983 claim against a private corporation acting under color of state authority that takes the county's property without paying just compensation.

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IV. ORIGINAL DEFENDANT AND RELATED PARTIES

Alabama Power Company
(Including all officers, directors and stockholders)

Southern Company Services, Inc.
(Including all officers, directors and stockholders)

Alabama Property Company

Southern Electric Generating Company

TABLE OF ABBREVIATIONS

"THE PLAINTIFF" OR "RANDOLPH COUNTY" OR "THE COUNTY" OR "THE PETITIONER"	Randolph County was the plaintiff in the District Court, the appellant in the appeal to the Eleventh Circuit and the petitioner herein.
	Randolph County owned the subject roads and bridges that were condemned and flooded by the Power Company.
"THE POWER COMPANY" OR "APCO"	The Alabama Power Company was the defendant below and the appellee in the appeal to the Eleventh Circuit.
	The Alabama Power Company condemned and flooded the roads and bridges which collectively were the subject matter of Randolph County's claim for "just compensation" in the proceedings below.
"PRINCIPAL OF DOMINANT SOVEREIGN AUTHORITY"	Political subdivisions as creatures of the state do not possess the same constitutional rights and privileges as private corporations or individuals which the political subdivision may exercise against the state or in opposition to the will of the state unless such rights and privileges are expressly conferred upon them by the state.

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No.

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RANDOLPH COUNTY,
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PETITION FOR WRIT OF CERTIORARI

The petitioner, Randolph County, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on March 18, 1986, and amended on July 28, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals on original deliverance is reported at 784 F.2d 1067 (11th Cir. 1986). The manuscript of the Court's original opinion is attached hereto as Appendix A. The Court of Appeals' opinion amended on rehearing appears as Appendix B. The holding of the Court of Appeals concerning the Section 1983 issue which is the subject of this petition appears on pp. A-9 - A-11 and p. A-12 herein.

The two orders of the District Court granting APCO's motion for summary judgment on the Section 1983 claim appear herein as Appendix C and D respectively.

JURISDICTION

The opinion of the Court of Appeals on original deliverance was entered on March 18, 1986. A timely petition for rehearing and suggestion en banc consideration was denied in an amended opinion filed on July 28, 1986. This Petition for Writ of Certiorari was filed with this Court within the ninety (90) days provided for by 28 U.S.C. §2101(c). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U. S. CONSTITUTION, V AMENDMENT.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*

2. ALABAMA CONSTITUTION, ARTICLE I, §23.

Sec. 23. Eminent domain.

That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; *but private property shall*

not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; *but just compensation shall, in all cases, be first made to the owner;* and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association.

3. ALABAMA CONSTITUTION, ARTICLE XII, §235.

Sec. 235. Taking of property for public use by municipal and other corporations.

Municipal and other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction. The legislature is hereby prohibited from denying the right of appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise, but such appeal shall not deprive those who have obtained the judgment of condemnation from a right of entry, provided the amount of damages assessed shall have been paid into court in money, and a bond shall have been given in not less than double the amount of the damages assessed, with good and sufficient sureties, to pay such damages as the property owner may sustain; and the amount of damages in all cases of appeals shall on demand of either party, be determined by a jury according to law.

4. CODE OF ALABAMA (1975), §10-4-320(5).

§10-4-320. Rights, powers and authority.

All corporations organized under the general laws of this state, or heretofore under a special act of the legislature, and all corporations organized under the laws of any other of the United States which have complied with the Constitution and laws of the state of Alabama as to foreign corporations and which by their charter have the right to manufacture, supply and sell to the public power produced by water as a motive force, shall, after acquiring by purchase, or otherwise than by condemnation, a dam site or power site comprising not less than one acre of land upon each and opposite sides of any watercourse or after acquiring by purchase, or otherwise than by condemnation, a dam site comprising not less than one acre of land upon one side of any watercourse and, where the dam site on the other side of such watercourse is owned or controlled by the United States, shall have acquired the permission of the United States to attach to or use the lock, dam or other property owned or controlled by the United States for an abutment site on the other side of such watercourse, in addition to other powers conferred by law, have the following rights, powers and authority:

(5) To acquire by condemnation the right to flood private roads and shall have the right to flood public roads by paying to the county commissions of counties in which public roads are the cost of locating, laying out and opening other public roads in lieu of and to the same extent as the public roads flooded or intended to be flooded; but such corporation may appeal from the order of the county commission to the circuit court of the county within 30 days after the making of such order, by filing with the judge of probate of the county a written notice of appeal, and on such appeal the trial shall be de novo. Upon the payment of such corporation to the county commission of the sum fixed by such commission, together with the costs of the

proceeding pending such appeal, and upon the execution of a bond in double the amount of such damages or amount so fixed, with good and sufficient sureties to pay such damages as the county may sustain, the corporation shall be entitled to flood the roads which are made the object of the proceeding; but such right shall not vest absolutely in such corporation until the final determination of the case and the payment or deposit in court of such damages or compensation as shall be adjudged.

5. 42 USC §1983.

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitutions and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

6. 16 USC §803 (c).

§803. Conditions of license generally.

All licenses issued under this subchapter shall be on the following conditions:

Maintenance and repair of project works; liability of licensee for damages

(c) That the licensee *shall* maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, *shall* make all necessary renewals and replacements, *shall* establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. *Each licensee here-*

under shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

STATEMENT OF THE CASE

This case presents the County's claim for just compensation for the flooding of twelve roads and bridges which collectively made up an integral part of the transportation system of Randolph County. See Appendix E.

The Alabama Power Company (hereinafter "APCo") by an exercise of the right of eminent domain condemned and flooded certain public roads and bridges in Randolph County, Alabama, in order to build a dam to generate electric energy. APCo secured a license for this project under the Federal Power Act.[1] As is permitted by §814 of Federal Act, APCo elected to condemn the subject property under the provisions of the state law of Alabama. Section 10-4-320(5) Code of Alabama (1975) is the applicable state statute which, in effect, "delegates" the sovereign power of eminent domain to corporations invested with the privilege of taking property for public use (which APCo was by virtue of the license which it had secured from the Federal Energy Regulatory Commission under the Federal Power Act).

The Alabama statute delegating the power of eminent domain is not in derogation of the property owners right to "just compensation" which is expressly provided for and protected by the Constitution of the State of Alabama. Alabama Constitution of 1901, Art. I, §23 and Art. XII, §235. In point of fact, the statute by its very terms required APCo to compensate the County in accordance with the substitute facilities measure of compensation.

The Power Company paid the County a total of $1,056,012.24 for all twelve roads and bridges. The County's expert witness

[1] 16 USC §791 et seq.

calculated the correct value (as of 1974 — the date of APCo's last amended petition for condemnation) to be between $7,785,720.88 and $9,185,995.79 or a loss to the citizens of Randolph County of between six and a half and eight million dollars. See Appendix E. It would cost the County almost a half million dollars more than the total compensation the Power Company paid them just to replace five roads and bridges. See Appendix E. Five roads and four bridges are still under water and unusable. Because the Power Company did not pay adequate and just compensation, the County cannot afford to replace the remaining roads and bridges although the citizens of Randolph County want and need these facilities.

The County filed its original complaint in the state court on August 5, 1981. This action was removed to the District Court for the Middle District of Alabama, Eastern Division, on the Power Company's allegation that federal rights were involved.

As is pertinent to this petition, the plaintiff's complaint charged APCo with taking the County's property without just compensation and, therefore, violating its federally protected rights under color of state law under 42 USC §1983. The District Court granted APCo's motion for summary judgment on this count which order was based exclusively on the application of the dominant sovereign authority principle. See Appendices C and D. This order was entered before the case was set for trial. Therefore, the plaintiff was never afforded the opportunity to try the §1983 claim. The Court of Appeals affirmed this order again resting its opinion solely in reliance on the dominant sovereign authority principle.

The case was tried on the counts remaining in the plaintiff's complaint and when the jury was unable to agree on a verdict, the District Court declared a mistrial. Subsequently the court granted APCo's motion for directed verdict which ruling was affirmed by the Eleventh Circuit. This Petition does not seek review of this portion of the opinion of the Court of Appeals.

STANDARD OF REVIEW

We call the Court's attention to the fact that neither the District Court's order nor the Court of Appeals' ruling concerning the grant of summary judgment was a discretionary decision but were based solely and exclusively on a conclusion of law; viz., the application and effect of the dominant sovereign authority principle.

> Conclusions of law rendered by means of summary judgment are subject to the same standard of appellate review as any question of law raised upon appeal. *Morrison v. Washington County, Alabama,* 700 F.2d 678, 682 (11th Cir. 1983).

In short, both courts held that because of the dominant sovereign authority principle the plaintiff county had no federally protected right cognizable under §1983. Stated otherwise, the plaintiff County could not because of this principle assert its federally protected right in a claim against the state or in conflict with the will of the state.

In view of the fact that the rulings of both lower courts rested solely on this one conclusion of law, the following questions are not deemed by the County to be disputed or at issue in this petition.

1. Whether APCo in exercising the power of eminent domain under the Alabama statute delegating that power to private corporations acted under "color of state law" — or — the related question of whether APCo's exercise of the delegated power of condemnation constituted "state action."

It is certainly true that this issue was not decided adversely to the County by either of the lower courts. It is probably accurate to state that both of the lower courts assumed without deciding that the elements of "color of state law" and/or "state action" (whether involving identical requirements or separate inquiries) were met by virtue of the fact that APCo's right of condemnation was acquired solely in consequence of the Alabama statute delegating the sovereign power of eminent domain to private corporations.

2. Whether, in fact, the County received "just compensation" for the flooded roads and bridges -- or -- the related question of whether the County was, in fact, paid by the constitutionally appropriate method of determining "just compensation."

As to the justness of the compensation actually paid by APCo we note that the Court of Appeals aptly observed that "[I]t was shown that this sum sufficed for but a part of the new roads and bridges the flooding made necessary". Appendix A. p. A-3.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This Petition seeks review of an order granting the Power Company's motion for summary judgment addressed to the count in which the plaintiff asserted a 42 USC §1983 claim (hereinafter the §1983 claim). The original order and the Court of Appeals' opinion affirming rest solely on a conclusion of law which your Petitioner contends is erroneous. The District Court and the Eleventh Circuit based their holding on the assumption that the dominant sovereign authority principle was legally applicable and that, in consequence, the County had no federally protected right cognizable under §1983 which it could assert against the state.

The County Possesses A "Federally Protected Right"

It should be undisputed that *except for the application of the dominant sovereign authority principle,* the County's right to just compensation is in every respect, a "federally protected right." The cases cited below which establish the truth of this proposition were cited to the Court of Appeals in our principal brief and in our reply brief on appeal and in two separate Applications for Rehearing. The Court of Appeals neither cited, discussed nor distinguish any of the County's authorities on this point.

(1) *Under The United States Constitution*

The County's right to just compensation is protected under

the Fifth Amendment to the United States Constitution. This Court in *United States v. 50 Acres of Land,* ..... U.S. ... , 105 S.Ct. 451 (1984) held that the reference to "private property" in the Takings Clause of the Fifth Amendment encompassed the public property of state and local governments.

> Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees.
>
> *United States v. 50 Acres of Land, Ibid.* at 456. See also *Woodville v. United States,* 152 F.2d 735, 736-737 (10th Cir. 1946).

Though the meaning of "property" as used in the Fifth Amendment is a federal question, it will normally obtain its content by reference to state law. *United States v. Powelson,* 319 U.S. 266, 279 (1942). See also *Chicago B & Q RR Co. v. Chicago,* 166 U.S. 226 (1879) (concerning the application of the "just compensation" clause of the Fifth Amendment to the states through the Fourteenth Amendment). It is irrefutably clear that Randolph County's legal interest in the County's road and bridges is derived from and protected by the Alabama Constitution, Alabama Constitution of 1901, Art. I, §23, Art. XII, §235. The Alabama Supreme Court has expressly and repeatedly held that the right to just compensation inures to the benefit of political subdivisions. *State v. Atkins,* 439 So.2d 128, 130 (Ala. 1983); *State v. Jefferson County Board of Education,* 280 Ala. 303, 306-307, 211 So.2d 146 (1968); *Jefferson County v. City of Birmingham,* 217 Ala. 268, 270, 115 So. 422 (1928). In fact, the Alabama Supreme Court has even held that the *method of ascertaining compensation* is itself an essential part of the constitutional guarantee to just compensation. *Jefferson County v. Adwell,* 267 Ala. 544, 552, 103 So.2d 143 (1958).

(2) *Under Other Federal Laws.*

Randolph County's property rights are further protected under the Federal Power Act under which APCo obtained its license to build the dam. See *Georgia Power Company v. Sanders,* 617 F.2d 1112, 1118 (5th Cir. 1980); (even though the

measure of damages is determined by state law); *Public Utility District No. 1 of Pend Oreille County v. City of Seattle,* 382 F.2d 666, 670 (9th Cir. 1967); *United States v. Central Stockholders Corp. of Valliejo,* 52 F.2d 322, 331 (9th Cir. 1931); *Henry Ford & Son, Inc. v. Little Falls Fibre Company,* 280 U.S. 369, 378 (1930). It should be noted that the relevant provisions of this Act are expressed in mandatory terms. See §803(c). In point of fact, it was the implication of this very same federal law which provided the basis for the Power Company's petition to remove the original suit from the state court to the federal court.

Thus the County's interest in the subject property constitutes a federally protected right under the Constitution of the United States and other federal laws unless and except these federally protected rights are abrogated by application of the dominant sovereign authority principle.

Note On "Color Of State Law"

The power of eminent domain is inherently an incident to the sovereign power of the state. See *Cincinnati v. Louisville and N R Co.,* 223 U.S. 390, 404 (1912). In its petition for condemnation, APCo specifically invoked the Alabama statute by which the legislature delegated the power of condemnation to private corporations. APCo's condemnation of the subject property necessarily satisfied the "color of state law" and/or the "state action requirement" of §1983.[2]

However, it must be noted that the state statute[3] under which APCo condemned the County's property is not (and constitutionally could not be) in conflict with Randolph County's constitutionally protected right to just compensation. Alabama Constitution of 1901, Art. I, §23, Art. XII, §235. *Alabama Power Company v. Taunton,* 465 So.2d 1105, 1107 (Ala. 1984);

[2]Justice Rehnquist's observation in *Jackson v. Metropolitan Edison Co.* is appropriate. "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite different one." *Ibid.* 419 U.S. 345, 353 (1974).

[3]Code of Alabama, 1975, §10-4-320(5).

Johnston v. Alabama Public Service Commission, 287 Ala. 4417, 418-21, 252 So.2d 75 (1971). Clearly APCo acted with full knowledge of the state statute (including the expressly stated conditions and limitations).

A complaint which alleges a taking of the plaintiff's property without just compensation is appropriate under §1983. *Hotel Coamo Springs, Inc. v. Hernandez Colon,* 426 F.Supp. 664, 674 (D.C. P.R. 1976); *Archer Gardens Ltd. v. Brooklyn Center Development Corp.,* 468 F.Supp. 609, 613 (D.C. S.D. N.Y. 1979); *Baldwin v. Appalachian Power Company,* 556 F. Supp. 241, 242 (4th Cir. 1977); *Inmobiliaria Borinquen, Inc. v. Garcia Santiago,* 295 F.Supp. 203, 205 (D.C. P.R. 1969); *Progress Development Corp. v. Mitchell,* 286 F.2d 222, 230 (7th Cir. 1961). See also *Stearns v. Smith,* 551 F.Supp. 32, 36 (D.C. S.D. Texas 1982).

Rule of Construction

In view of its remedial nature, this Court has often noted that §1983 should be construed generously to further its primary purpose. See e.g., *Gomez v. Toledo,* 446 U.S. 635, 639 (1980).

In its opinion as modified on rehearing, the Court of Appeals held as a matter of law that a political subdivision has no claim and no cause of action in opposition to the will of the state and therefore no "federally protected right" under §1983. This conclusion is in error for three separate reasons.

1. The principal of dominant sovereign authority is not applicable to the plaintiff's claim in the present case.

The Dominant Sovereign Authority Principle.

The principle that your petitioner refers to as the "dominant sovereign authority" principle is set forth in *Appling County v. Municipal Electric Authority,* 621 F.2d 1301, 1307-1308 (5th Cir. 1980) cert. denied 449 U.S. 1015 (1980) (hereinafter *Appling County*) and *City of Safety Harbor v. Burchfield,* 529 F.2d 1251, 1254 (5th Cir. 1976) (hereinafter cited

Birchfield) and the cases cited therein. See also *Hunter v. City of Pittsburgh,* 207 U.S. 161, 169 (1907) (hereinafter *Hunter*).

The principle that political subdivisions (i.e., cities and counties) as creations of the state do not possess rights equivalent to a private citizen which may be exercised in opposition to the will of the state will be referred to by your Petitioner as "dominant sovereign authority principle." The principle is based on the truth of the observation that in view of the fact that the State is the creator (via the legislature) of political subdivisions, the State has the dominant sovereign authority to alter or amend the rights, privileges and immunities of its creation. It is significant to note that the sole and very purpose for which the State creates political subdivisions is to aid and assist the State in accomplishing its will and objectives. See *Hunter, Ibid.* at 178. The operative effect of the dominant sovereign authority principle is to limit the right of a political subdivision to *challenge* state legislation. That is, the principle restricts the right of a political subdivision to assert a claim in *opposition to the will* of its creator. See *Birchfield* at 1254 and *Appling County* at 1307-1308.

In every single case in which the courts have applied the dominant sovereign authority principle, the court found and identified a *conflict* between the interest of the state and the claim of the political subdivision. Your Petitioner has not found a single authority which has applied the dominant sovereign authority principle to defeat a claim which seeks to advance or promote the will of the state. Each and every case cited in the opinions of the Court of Appeals (see Appendices A and B) and in the orders of the District Court (see Appendices C and D) involved a claim by a political subdivision that was directly in opposition to the will of the state or constituted a direct challenge to state legislation.

Randolph County's claim is not *against the State of Alabama* nor is it directly or indirectly *in opposition to the will of the State of Alabama.* To the contrary – Randolph County's claim seeking just compensation for the condemnation of its property

is, in every respect, in furtherance of the expressly stated will of the State of Alabama.

The Will Of The State of Alabama.

The will of the State of Alabama concerning the matter asserted in Randolph County's claim is absolutely clear and unequivocal. Simply stated, it is that in all cases the owner of property must be paid just compensation for property taken by the exercise of the power of eminent domain. Constitution of Alabama 1901, Art. I, §23. Any private corporation invested with the privilege of taking property is likewise constitutionally bound to pay just compensation. Constitution of Alabama, Art. XII, §235.

As we have noted, the Alabama Supreme Court has expressly and repeatedly held that the constitutionally right to just compensation inures to the benefit of political subdivisions – even in eminent domain proceedings *brought by the state*! *State v. Atkins, Ibid.* at 130; *State v. Jefferson County Board of Education, Ibid.* at 306-307; *Jefferson County v. City of Birmingham, Ibid.* at 270.

Object and Intent Of The County's Claim In The Present Case.

The claim expressed in the plaintiff's complaint in the present case seeks just compensation. Randolph County's claim does not challenge state legislation. The County's claim is in no way in conflict with the will of the State of Alabama. To the contrary, the County's claim is supportive of state legislation and in every respect in furtherance of the will of the State of Alabama.

The Present Claim Is Not Action Against The State of Alabama.

Randolph County's complaint does not present a claim *against* the State of Alabama nor does it assert a claim in *opposition* to the will of the State of Alabama nor does it involve a *challenge* to state legislation there must be a finding of some such antagonism for the court to apply the dominant sovereign

authority principle. The State of Alabama is not a defendant in the present case. The State of Alabama did not condemn the plaintiff's property. The Alabama Power Company did. In point of fact, as a part of the same project, the Power Company condemned and flooded two bridges belonging to the State of Alabama (for which APCo paid the State fully and justly and in accordance with the substitute facilities doctrine). If the State were a party to these proceedings, their position would be supportive of the County's claim that just compensation be paid to its citizens for the taking of their public roads and bridges. The State of Alabama's political and economic interest are supportive of the County's claim and are in direct conflict with the Power Company's actions.

The present claim is against the Alabama Power Company for a gross abuse of the power to condemn delegated to private corporations by the state legislature. The very purpose of this statutory delegation of authority is to serve a public purpose and promote the general welfare. *Alabama Power Company v. Taunton,* 465 So.2d 1105, 1107 (Ala. 1984). Even if it wanted to, the legislature could not impair a property owner's constitutionally right to just compensation. *Johnston v. Alabama Public Service Commission,* 287 Ala. 417, 419, 252 So.2d 75 (1971).

The will of APCo in the present case could not possibly be the will of the State of Alabama. The will of APCo (established by the compensation APCo actually paid) was to pay less than the applicable Alabama statute required (U.S. §10-4-320(5), prescribing the substitute facilities method) and less than the Alabama constitution required (Art. I, §23 and Art. XII, §235 requiring "just compensation").

A property owner's claim seeking redress for a private corporation's abusive exercise of the delegated power of condemnation does not involve a claim in conflict with the state. In such a case, it is the actions and conduct of the condemnor that is in conflict with the will of the state.

If the lower court's holding on the dominant sovereign authority principle were correct, there would be no reason to

limit its application to the §1983 claim. The dominant sovereign authority principle forbids the County to assert any action on any theory of recovery in a claim *against* the state. If Randolph County's complaint were truely against the State of Alabama, then no cause of action on any theory of recovery would have been permissible. The court below could have and should have applied the principle in granting a motion to dismiss each and every theory of recovery asserted in the County's complaint. That is, every claim asserted by the County contested APCo's exercise of eminent domain. If, without more, such a claim is necessarily and unavoidably in opposition to the will of the state, then the court below could have and should have relied on the dominant sovereign authority principle to dismiss the plaintiff's complaint in its without reference to any other principle of law and without reference to the facts of the case.

Furthermore, if the lower court's holding on the dominant sovereign authority principle were correct, then no political subdivision could ever legally resist any unjust condemnation regardless of the identity of the condemnor. The right of any and every private corporation to exercise the power of condemnation arises only by virtue of the state's statutory power of eminent domain. If every effort to seek redress from an abusive exercise of this delegated power places the plaintiff in opposition to the state, then no political subdivision could ever sustain a claim for just compensation against any private condemnor.

These two paradigms simply illustrate that the County's claim against APCo is not a claim against the state and that the principle of dominant sovereign authority is simply not applicable to the circumstances in the present case.

The Court of Appeals Erred In Applying The Dominant Sovereign Authority Principle.

The dominant sovereign authority principle applies only in a case where a political subdivision seeks to assert a claim *against* the state or *in opposition* to the will of the state. In resting its holding on the dominant sovereign authority prin-

ciple, the Court of Appeals erroneously assumed (without discussion or analysis) that that County's complaint presented a claim which challenged state legislation or was somehow in opposition to the will of the state. Randolph County does not now or never has asserted a claim in opposition to the will of the State of Alabama. The County agrees that political subdivisions are created to advance the will of the state. That is exactly what we are trving to do. In actual effect, the Court of Appeals has taken a principle that is intended to promote the will of the state and has applied it in a fashion that actually defeats the will of the state.

The dominant sovereign authority principle is simply not applicable in the present case so as to defeat Randolph County's claim. It is the clear will of the state of Alabama that Randolph County be paid just compensation when its property is condemned by an exercise of the sovereign power of eminent domain. That is precisely the same will and result Randolph County is seeking. The very legal basis for the County's complaint is that *the Power Company's* (not the state of Alabama's) actions were in opposition to the clear and express will of state.

It must be conceded that except for the application of the dominant sovereign authority principle, the County's legal interest in its roads and bridges constitutes a federally protected right within the meaning of §1983 (see authorities herein pp. 9-11). The dominant sovereign authority principle only eliminates or abrogates a federally protected right in the context of a claim which is asserted by a political subdivision *and against the state.* That is, except for the Court's misapplication of the dominant sovereign authority principle, the allegation of the plaintiff's complaint would clearly constitute the assertion of "a federally protected right" for §1983 purposes. The lower courts' holdings on the §1983 issues were based solely on the principle that a political subdivision may not maintain an action in opposition to the will of the state and therefore the plaintiff has no "federally protected right" under §1983. On principle that holding is in error for the reasons herein set

forth. Further, that holding is in error for the reason that it is in conflict with every single case involving an application of the dominant sovereign authority principle. Your Petitioner can find no case which applies the dominant sovereign authority principle so as to defeat a claim by a political subdivision which is in every way supportive of (rather than in conflict with) the will and interest of the sovereign. In each and every case cited by the District Court and the Court of Appeals, the court defined the legislature of the claim asserted by the political subdivision and identified the interest of the state and made an actual determination that they were in conflict.

The factual and legal issues presented by Randolph County's §1983 claim have never been litigated. The Court of Appeals' holding forbids *any analysis* of whether the County's claim is in fact or in law actually *in opposition* to the will of the state. It absolutely is *not*! The Court of Appeals' holding forbids any determination of the existence or nature of the plaintiff's underlying federally protected right. If the Court is going to use the dominant sovereign authority principle to deny the plaintiff redress under §1983, then it must determine how or where in the County's claim and the State's interest are in conflict. The Court of Appeals merely held as a matter of law that the plaintiff has no federally protected right whatsoever simply and solely because the plaintiff is a political subdivision.

2. By its very terms, the dominant sovereign authority principle would permit recovery in the present case. (Even if this were a claim *against* the state — which it is *not*!)

By its very terms, the dominant sovereign authority principle recognizes and protects the rights of political subdivisions which are "expressly conferred upon them by the state". Court of Appeal's Original Opinion, Appendix p. A-6, citing *Birchfield* at 1254.

The County's right to just compensation is "expressly conferred" by the Alabama Constitution, Art. I, §23; Art. XII,

§235. As your Petitioner has noted, the Alabama Supreme Court has repeatedly recognized this constitutionally protected right *in claims by a political subdivision in opposition to a taking by the state.* See authorities this Petition, p. 10. The law of Alabama could not be clearer. The very right which the County seeks to assert is "expressly conferred" by the Alabama Constitution and expressly upheld by the Alabama Supreme Court.

Neither in its original opinion nor in its modified opinion has the Court of Appeals considered or distinguished the cases which the County cited on this point.

The Eleventh Circuit's conclusion foreclosing the existence of the plaintiff's rights is based on a principle the stated terms of which would expressly recognize the legal validity of the right which the plaintiff seeks to assert in present action.

APCo certainly does not have a greater immunity to such claims for redress that the State has provided for itself.

3. The lower court's holding overlooks a constitutional exception to the dominant sovereign principle.

The Court of Appeals has applied the principle of dominant sovereign authority as if it were an absolute and inflexible principle without any exception regardless of the circumstances. This interpretation is contrary to this Court's holding in *Gomillion v. Lightfoot,* 364 U.S. 339 (1960):

> We freely recognize the breadth and importance of this aspect of the State's political power. To exhalt this power into an absolute is to misconceive the reach and rule of this Court's decision in the leading case of *Hunter* (citing), and related cases relied upon by the respondents.
>
> *Gomillion, Ibid.,* at 342.

> This line of authority conclusively shows that the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of the consequences. Legislative control of municipalities, no less than other state power, lies within the scope of rele-

> vant limitations imposed by the United States Constitution.
>
> *Ibid,* at 344-345.

Even if Randolph County's claim were in direct conflict with the will of the State of Alabama (which it is not) its legal viability should be considered as an exception to the dominant sovereign authority principle. The County's claim to just compensation is guaranteed by the Alabama Constitution. Under Alabama law, the state legislature could not constitutionally abrogate or impair the County's right to just compensation. *Johnston v. Alabama Public Service Commission, Ibid.* at 419; *State v. Atkins, Ibid.* at 130; *State v. Jefferson County Board of Education, Ibid.* at 306-307.

In any and all events, the Court should analyze the underlying constitutional nature of the plaintiff's claim to determine whether it falls within the scope of the *Gomillion* exception to the dominant sovereign authority principle.

We note again that the Court of Appeals neither in its original nor modified opinion ever considered or distinguished the plaintiff's cases on this point.

CONCLUSION

The Court of Appeals reached a holding that the plaintiff has no federally protected right solely because the plaintiff is a political subdivision. This conclusion of law rests solely on the dominant sovereign authority principle. This principle is not supportive of the court's holding. Randolph County's claim is in furtherance of not in opposition to the will of the State of Alabama. In contrast, APCo's abuse of the delegated power of condemnation is consequence of which the County was denied just compensation is in direct opposition to the will of the State.

The dominant sovereign authority principle would, by its very terms, permit recognition of the plaintiff's claim for just compensation as that right is expressly conferred by the Alabama Constitution.

This Court's holding (1) defeats the will of the State of Alabama that just compensation be paid to its political subdivisions for the taking of public property and (2) defeats both the language and the intent of Section 1983.

Respectfully submitted,

JOHN A. TINNEY
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HARE, WYNN, NEWELL & NEWTON

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing pleading upon the following attorneys of record by placing a copy of same in the U.S. Mail, postage prepaid, on this the 24th day of October, 1986.

JAMES H. MILLER, III
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_____
Of Counsel

APPENDICES

APPENDIX A

ELEVENTH CIRCUIT'S OPINION ON ORIGINAL DELIVERANCE

RANDOLPH COUNTY,
Plaintiff-Appellant,

v.

ALABAMA POWER COMPANY,
Defendant-Appellee.

No. 84-7292.

United States Court of Appeals, Eleventh Circuit.

March 18, 1986.

County brought action against water power company under section 1983 and the Federal Power Act, with pendent claims of fraud, alleging inadequate compensation for flooding of county roads and bridges resulting from power company's construction of dam. The United States District Court for the Middle District of Alabama, Myron H. Thompson, J., granted power company's motion for directed verdict, and county appealed. The Court of Appeals, Nichols, Senior Judge, sitting by designation, held that: (1) layman's representations on behalf of power company as to measure of compensation for county could not be basis of claim of fraud; (2) Alabama fraud statute regarding suppression of material facts did not apply; (3) county had no action under Alabama deceit statutes; (4) it was within trial judge's discretion to exclude factual allegations not set forth in pretrial order; and (5) county had no federally protected right against state's taking of public property without compensation.

Affirmed.

1. Eminent Domain

Proper way to fix award for water power company's taking of county roads and bridges which were flooded when power

company constructed dam and reservoir was a legal matter, not a factual one. Ala.Code 1975, §§ 6-5-100 to 6-5-104, 10-4-320(5).

2. Fraud

Layman's representations, on behalf of water power company, as to proper standard to use, as matter of law, to compensate county for flooding of roads and bridges which resulted from power company's construction of dam and reservoir could not be basis of claim of fraud for either intentional/reckless or innocent/mistaken misrepresentations. Ala.Code 1975, §§ 6-5-100 to 6-5-104, 10-4-320(5); 42 U.S.C.A. § 1983; Federal Power Act, § 321, as amended, 16 U.S.C.A. § 791a.

3. Fraud

Evidence that dollar amounts in county court's orders for compensation to county from water power company for flooding of county roads and bridges as result of power company's construction of dam were based on county engineer's studies supported finding, in county's fraud action against the power company, that the county did not rely on power company's statements concerning measure of compensation.

4. Fraud

Alabama fraud statute regarding suppression of material facts, Ala.Code 1975, § 6-5-102, did not apply to county's charges of fraud against water power company in connection with setting of compensation for county for power company's flooding of county roads and bridges as result of construction of dam; relationship between the county and the power company, which by statute was required to pay county for flooded roads and bridges, was not confidential, and particular circumstances of the case did not impose obligation to communicate. Ala.Code 1975, § 10-4-320(5).

5. Fraud

Under Alabama law, county had no action for deceit against water power company in connection with setting of compensa-

tion for county for power company's flooding of county roads and bridges resulting from construction of dam, absent willful or reckless misrepresentation or suppression of material fact with intent to mislead. Ala.Code 1975, §§ 6-5-103, 6-5-104.

6. Federal Civil Procedure

It was within trial judge's discretion to exclude factual allegations not set forth in pretrial order. Fed.Rules Civ.Proc.Rule 16(e), 28 U.S.C.A.

7. Eminent Domain

County had no federally protected right against state's taking of public property without paying compensation. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 5.

Appeal from the United States District Court for the Middle District of Alabama.

Before RONEY and HATCHETT, Circuit Judges, and NICHOLS,* Senior Circuit Judge.

NICHOLS, Senior Circuit Judge:

This is an appeal from the United States District Court, Middle District of Alabama, Eastern Division, granting Alabama Power Company's motion for directed verdict. The district court determined that even if Randolph County could prove the misrepresentations alleged, the evidence did not support a finding of reliance as required by Alabama state law on fraud. We affirm.

Background

Alabama Power Company (APCo) constructed a dam and reservoir on the Tallapoosa River in Randolph County, Alabama, which required the flooding of roads and bridges main-

*Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

tained by Randolph County (county) in the Crooked Creek watershed area. Alabama law permits a water power company, such as APCo, to flood public roads and bridges if it pays the affected county "the cost of locating, laying out and opening other public roads in lieu of and to the same extent as the public roads flooded or intended to be flooded." Ala.Code § 10-4-320(5) (1975).

In 1965, APCo and the county began negotiations to determine the amount of compensation APCo owed the county pursuant to state law. In 1969, Randolph County Court of County Commissioners (Commissioners) issued an order setting compensation at $781,015.24. Upon APCo's 1974 petition, the Commissioners amended the amount to $1,056,015.24 to cover the additional flooding needed to meet federal licensing requirements. By the end of 1977, APCo paid the county the amount determined in the 1974 amendment. It was shown that this sum sufficed for but a part of the new roads and bridges the flooding made necessary.

Proceedings Below

In 1981, the county sued APCo under 42 U.S.C. § 1983 and the Federal Power Act, 16 U.S.C. §§ 791a-828c, with pendent claims of fraud, alleging inadequate compensation. By order of November 10, 1983, No. 81-119-E, the court granted APCo's motion for summary judgment on all federal law claims. The case went before a jury on the issue of fraud. The jury, unable to reach a verdict, was discharged and a mistrial declared. APCo moved for directed verdict.

The county argued that the Commissioners were fraudulently induced into issuing orders in 1969 and 1974 that set the level of compensation lower than the amount to which the county was actually entitled. Specifically, the county claimed that APCo falsely represented the standard or measure of compensation on which the Commissioners relied in making their determination, *i.e.*, "fair market value" instead of replacement cost. False representation in Alabama, the district court found

in its decision of April 4, 1984, requires a false representation as to a materiai fact, reasonable reliance on that representation and a resultant injury. *Burroughs Corp. v. Hall Affiliates, Inc.*, 423 So.2d 1348, 1353 (Ala.1982). The district court determined that the evidence as to whether the alleged misrepresentations were actually made was in conflict, but that neither party introduced evidence that "even suggested that the county relied upon APCo's alleged representations concerning the measure of compensation * * *." Instead, the court found undisputed evidence that the 1969 order was based on the studies of County Engineer C. P. McNeil (McNeil); that the McNeil studies focused on the cost of construction of functionally equivalent substitute facilities; and that the 1974 order was based on the McNeil studies with adjustments made for inflation and federal licensing requirements. Viewing all the evidence in the light most favorable to the county, the district court determined that "the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict," *Federal Kemper Life Assurance Co. v. First National Bank*, 712 F.2d 459, 464 (11th Cir.1983), and accordingly, granted APCo's motion for directed verdict. The county appealed.

Discussion

I. *Charges of Fraud.*

The county argues that the district court erred in granting APCo's motion for directed verdict on the charge of fraudulent misrepresentation of the measurement method. On a motion for directed verdict, the court should "view all the evidence, together with all logical inferences flowing from the evidence, in the light most favorable to the non-moving party." *Neff v. Kehoe*, 708 F.2d 639, 641 (11th Cir.1983). On this basis, we must affirm the district court.

[1] We first note that the proper way to fix an award for a taking of this kind is a legal matter, not a factual one. 4 *J. Sack-*

man, Nichols on Eminent Domain § 12.1[3] (3d ed. 1985). Thus, the misrepresentation alleged is a matter of law. Alabama law on fraud, codified in Ala.Code § 6-5-100 to 104 (1975), *Barrett v. Farmers & Merchants Bank,* 451 So.2d 257, 264 (Ala.1984), generally requires a misrepresentation of a material fact. *Army Aviation Center Federal Credit Union v. Poston,* 460 So.2d 139, 142-43 (Ala.1984); *Neff v. Kehoe,* 708 F.2d at 642; *United States v. Burgreen,* 591 F.2d 291, 297 (5th Cir.1979). Moreover, the Alabama Supreme Court has recently held that there is no duty to disclose the law because "it is available and presumed known." *Moore v. Liberty Mutual Insurance Co.,* 468 So.2d 122, 124 (Ala.1985); *Henson v. Estes Health Care Center, Inc.,* 439 So.2d 74, 76 (Ala.1983). Nonetheless, a rare few of Alabama cases have found fraud based on a misrepresentation of law. *Spry Funeral Homes, Inc. v. Deaton,* 363 So.2d 786, 789 (Ala.Civ.App.1978); *Bank of Loretto v. Bobo,* 37 Ala.App. 139, 67 So.2d 77, 85, *cert. denied,* 259 Ala. 374, 67 So.2d 90 (1953). Those decisions involved representations made in exceptional circumstances, *e.g.,* where to hold to the contrary would be against public policy or where the speaker was an attorney. In this regard, we note that the Alabama Supreme Court recently found no fraud where the party charged with the misrepresentation was a layman. "Moore's allegations would require [the insurance representative] Frost to give legal advice, which the law prohibits a layman from doing." *Moore,* 468 So.2d at 124.

[2] The record demonstrates that the member of APCo who allegedly made the misrepresentations was Neal Williams, a layman. As a layman, Mr. Williams is prohibited by law from giving legal advice. His representations as to the proper standard to use, a matter of law, cannot be the basis of a claim of fraud for either intentional/reckless or innocent/mistaken misrepresentations.

[3] The county also argues that the district court erred in granting APCo's directed verdict motion because it improperly found that the county did not rely on APCo's statements. Again we disagree.

Alabama fraud law requires reasonable reliance and a resultant injury. The district court was correct in concluding that the evidence did not even suggest reliance where there was undisputed evidence that the dollar amounts in the 1969 and 1974 orders were based on the *county* engineer's studies that were based on the substitute facilities doctrine.

There are two other factors as regards reliance. First, we note that the transaction involving "real estate is a kind of transaction where retention of counsel is ordinary and usual," *Mills v. United States,* 410 F.2d 1255, 1258, 187 Ct.Cl. 696 (1969). The record demonstrates that Randolph County had a lawyer on retainer who could have advised it. The record, however, is not clear as to the actual involvement of this county lawyer. Mr. Fred McCain, a county commissioner at the time of the compensation negotiations, testified "[w]ell, I guess it's the commissioners' fault because we didn't look into the law, and nobody didn't tell us what the law was, and we took Mr. Neal Williams' word that that's all they [APCo] was going to pay." Tr. at 568.

Second, we are aware of a 1951 Fifth Circuit case describing the substitute facilities doctrine, *City of Fort Worth, Texas v. United States,* 188 F.2d 217, 222 (5th Cir.1951), and a law review article, Note, *Just Compensation and the Public Condemnee,* 75 Yale Law Journal 1053 (1966), which describes the substitute facility doctrine as one developed by courts to meet the unique needs of public condemnees who must recover for the loss of bridges, roads, etc. It appears to us that the county could have made better use of its attorney and that its attorney could have determined the proper legal standard without undue burden. He could well have got enough light from the statutory text alone. This does not seem to be an example of reasonable reliance on the other side of the table.

[4] The county argues that the district court erred in not ruling on the 6-5-102 Suppression of Material Facts charge under which affirmative misrepresentation is not required. We disagree. Reviewing Alabama law on section 102, the Eleventh Circuit recently held that either the confidential relations of

the particular circumstances of the cast must impose an obligation to communicate. *Kaye v. Pawnee Construction Co.*, 680 F.2d 1360, 1370 (1982). Without either of these, active concealment is required and the fact concealed must be material. *Id.* We do not construe the relationship between Randolph County and the Power Company, who by statute must pay the county for its flooded roads and bridges, as confidential. In addition, the particular circumstances of the case do not impose an obligation to communicate. The Court of County Commissioners was to determine the appropriate compensation and APCo could either pay or appeal. *See* Ala.Code § 10-4-320(5) (1975) on the rights and authority of water power companies.

[5] As regards fraud, we do not find that the district court erred in not presenting the county's deceit charge to the jury. An action for deceit under 6-5-103 and 6-5-104 results from either a willful or reckless misrepresentation or a suppression of material facts with an intent to mislead. Because we did not find a willful or reckless misrepresentation or a suppression of material fact above, we do not find deceit now.

The former Court of Claims, now defunct, dealt in *Stockton v. United States,* 214 Ct.Cl. 506 (1977) with a case where an officer of the United States Army Engineers had obtained grant of a flowage easement in a deed he had drafted, by misrepresenting in a letter the legal effect of the language he used in the deed. The grant was made without substantial consideration. The government was held to have obtained only the limited rights described in the letter, not the broader ones of the deed. The court's analysis shows it regarded the case as belonging in the category of those in which a government contract was reformed because overreaching officials had taken advantage of a mistake which should have bee obvious to them. The case points to an avenue the county might have pursued with better chances of success, but the differences are obvious. The deed in *Stockton* was a "contract of adhesion" which the landowner had no hand in drafting and was asked to sign on representations that the matter was of small impor-

tance. The suspicion of modern law towards such contracts is well known.

We note that under the Alabama practice the County Commissioners constituted themselves a "Commissioner's Court," though not a court of record. After such consideration as seemed good to them, they entered an order in 1969, and a modification of it in 1974, setting the awards the county was to receive, each of them being in form unilateral orders or decrees, not bilateral contracts. The county in this litigation pretty much disregards this form, but that is no reason why we should do so. The Commissioners wielded the sovereign power, as the Army Engineers did in *Stockton*. They were the government. *APCo* was the suppliant. To picture such a body as being made the victim of a contract of adhesion when there was no contract at all, requires a particularly active imagination. To substantiate the scenario, the court's present representative adduces some picturesque details, for example, that one of the then Commissioners could not read or write, but the picture of this as any classic overreaching case is not fully drawn. Why the Commissioners made a determination so much, as it proved, to the county's disadvantage, is not really explained in the county's case, giving it the utmost possible weight, except as a sheer error of judgment. Without a clear explanation which pins some kind of estoppel or misconduct on *APCo*, the law of equity cannot be invoked. Misrepresentation as to the lawful manner of assessing an award just will not bear the load. The Commissioners can console themselves with the classic words of Mayor Fiorella LaGuardia of New York, "When I make a mistake, it is sure to be a beaut!"

II. *Pretrial Order and Fed.R.Civ.P. 16(e).*

The county argues that the district court erred in "striking" certain factual representations made by APCo. We do not see that the district court struck any factual allegations. Instead, the record reveals that the county, in its amended complaint filed December 6, 1983, claimed four other misrepresentations as a basis for relief: APCo's representations regarding the ele-

vation on which the county should base its calculations; APCo's representation that it did not need to treat the county the same as the state; APCo's representation on the escalation adjustment between the 1969 and 1974 orders; and APCo's representations that they would not build the dam unless the county accepted APCo's cost to benefits ratio. On January 25, 1984, the judge directed the parties to prepare a joint pretrial order. The pretrial order, filed February 21, 1984, did not include the four factual allegations above.

[6] Rule 16(e) of the Federal Rules of Civil Procedure provides that a pretrial order controls the subsequent action of the litigation. The parties are bound by their agreement to so limit issues and may not introduce at trial issues excluded in the pretrial order. *See Jackson v. Seaboard Coast Line Railroad Co.*, 678 F.2d 992, 1015 n. 34, 1019 (11th Cir.1982); *Allen v. United States Steel Corp.*, 665 F.2d 689, 696 (5th Cir.1982); 3 J. Moore, W. Taggard & J. Wicker, Moore's Federal Practice, ¶ 16.19 (2d ed. 1985). It is within the judge's discretion to exclude those matters not set forth and we see no abuse of discretion here.

III. *42 U.S.C. § 1983.*

[7] The district court granted APCo's motion for summary judgment on November 10, 1983, finding that the county does not have any federally protected right against a state that takes public property without paying compensation. We agree. As the Fifth Circuit aptly explained in *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254-55 (1976)

> [P]ublic entities which are political subdivisions of states do not possess constitutional rights, * * *, in the same sense as private corporations or individuals. Such entities are creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state. * * * The fact that public entities are not rightholders in the same sense as private parties has particular relevance in determining whether a municipality is a "per-

son" entitled to bring suit under the 1871 Civil Rights Act. * * * The legislative history as detailed in *Monroe* [v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961)] makes it clear that congressional concern in passing the Civil Rights Act was to create a federal remedy for *private persons* seeking redress of violations of their civil rights. * * * Accordingly, there is no reason why the Supreme Court's clear holdings in the context of suits against municipal defendants that municipalities are not persons within the meaning of the 1871 Civil Rights Act [including 42 U.S.C. § 1983, derived from § 1 of that Act] do not also apply where the municipality seeks to bring suit as plaintiff. [Citations omitted.] [Emphasis supplied.]

We need add nothing more.

Conclusion

We affirm the district court's granting of APCo's motion for directed verdict on the misrepresentation count; we see no error in the court's decision not to submit the suppression of facts and deceit counts to the jury; we see no error in the court's disregard of factual allegations excluded from the pretrial order; and we affirm the district court's granting of summary judgment on the 42 U.S.C. § 1983 count.

AFFIRMED.

APPENDIX B

ELEVENTH CIRCUIT'S OPINION ON RE-HEARING

RANDOLPH COUNTY,
Plaintiff-Appellant,

v.

ALABAMA POWER COMPANY,
Defendant-Appellee.

No. 84-7292.

United States Court of Appeals, Eleventh Circuit.

July 28, 1986.

Appeal from the United States District Court
for the Middle District of Alabama.

Petition for Rehearing and Suggestion
for Rehearing En Banc

(Opinion March 18, 1986. 11 Cir., 784 F.2d 1067).

Before RONEY and HATCHETT, Circuit Judges, and NICHOLS*, Senior Circuit Judge.

PER CURIAM.

IT IS ORDERED as follows:

On its own motion the court makes the following change in its slip opinion dated March 18, 1986. On page 2435 of the slip opinion, at page 1072-73 of 784 F.2d, delete the entire portion beginning with the words "The fact that public entities" through the sentence "We need add nothing more," and substitute the following therefor:

Although *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), undercut the

*Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

rationale of *Birchfield* that a municipality cannot sue under section 1983 because *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), held that it could not be sued, we have subsequent to *Monell* continued to hold that a municipality has no cause of action under section 1983. *Appling County v. Municipal Electric Authority,* 621 F.2d 1301 (5th Cir.), *cert. denied,* 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980).

IT IS FURTHER ORDERED that the petition for rehearing and suggestion for rehearing en banc filed by Randolph County is DENIED.

APPENDIX C

PORTIONS OF DISTRICT COURT'S ORDER OF NOVEMBER 10, 1983 GRANTING APCo MOTION FOR SUMMARY JUDGMENT ON §1983 COUNT

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

RANDOLPH COUNTY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 81-119-E
ALABAMA POWER COMPANY,	)	
	)	
Defendant.	)	

This cause is now before the court on defendant Alabama Power Company's September 12, 1983, motion for summary judgment. For the reasons stated below, the court concludes that the motion is due to be granted in part and denied in part.

I.

This lawsuit grows out of the construction of the R. L. Harris Dam and Reservoir on the Tallapoosa River in Randolph County, Alabama by Alabama Power Company (APCO). Construction of this reservoir required the flooding of certain roads and bridges in the Crooked Creek watershed area in Randolph County. Under Alabama law a water power company may flood public roads and bridges if it pays the court of county commissioners of the affected county "the cost of locating, laying out, and opening other public roads in lieu of and to the same extent as the public roads flooded or intended to be flooded." Ala. Code § 10-4-320(5) (1975). In 1965, APCO entered into negotiations with officials of Randolph County,

Alabama to fix the amount of compensation the power company owed the county pursuant to state law. In June 1969, the Randolph County Court of County Commissioners issued an order setting the company's compensation liability at $781,015.24. In 1974, it became apparent that APCO would have to raise the level of the reservoir an additional two feet in order to meet federal licensing requirements. Upon the power company's petition, the amount owed was recalculated at $1,056,015.24 to account for the additional flooding. By the end of 1977, APCO had paid the county the amount agreed to in 1974.

The county has brought this action alleging essentially that APCO fraudulently induced the county to set the amount of compensation owed by the power company for the flooded roads and bridges at a sum significantly lower than that mandated by Alabama law. The county alleges, among other things, that during the negotiation process the APCO failed to disclose the proper measure of value for the flooded facilities, misrepresented the legal standard for valuing the flooded facilities, misrepresented its duties under the statute, misrepresented its willingness to relocate the project, and misrepresented the period of time available in which the county could reach a decision on the amount of compensation owed. The county has brought this action under 42 U.S.C.A. § 1983 alleging that APCO, through its fraud, took property of the county and its citizens without just compensation as required by the fifth and fourteenth amendments to the U. S. Constitution, and the Federal Power Act, 16 U.S.C.A. §§ 791a-828c. Invoking this court's pendent jurisdiction, the county has also alleged state causes of action for deceit, suppression of material facts, and wilful and negligent misrepresentation, has moved for summary judgment on all claims.

II.

Summary judgment is only appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(c). The evidence presented to the court through affidavits and deposition testimony reveals genuine issues of fact concerning the representations APCO allegedly made and whether those representations were relied upon by the county. Leaving contentions as to these factual issues aside, the power company maintains that the county's claims must fail as a matter of law.

A. Claim Under Section 1983

As already noted, the county's section 1983 claim is that APCO by its fraud, took roads and bridges belonging to the county and its citizens without paying just compensation in violation of the fifth and fourteenth amendments to the U. S. Constitution. Two elements are necessary to a cause of action under section 1983: (1) that the conduct complained of was committed by one acting under color of state law; and (2) that the conduct complained of deprived a person of rights secured by the United States Constitution or federal statute. *Morrison v. Washington County, Alabama,* 700 F.2d 678, 682 (11th Cir. 1983). The court assumes without deciding that the Alabama statute, quoted above, suffices to place the power company's actions under color of state law. The issue then become whether the county has any federally protected right against state action that takes public property without paying compensation to the county. It does not. A county is purely a creature of a state and, as such, is subject to the authority of the state unbridled by the U. S. Constitution.

In *Hunter v. City of Pittsburgh,* 207 U.S. 161, 28 S.Ct. 40 (1907), the Supreme Court rejected a constitutional challenge brought by the City of Allegheny, Pennsylvania to its annexation into the City of Pittsburgh under a Pennsylvania law which allowed such annexations upon a majority vote of the citizens of the affected cities, regardless of the vote in the city to be annexed. The Court stated that:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. . . . . The state, therefore, at its pleasure, may

> modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or part of it with another municipality, repeal the charter and destroy the corporation. All this may be done conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its actions to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

207 U.S. at 178-79, 28 S.Ct. at 46. *See also Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 53 S.Ct. 431 (1933). A county in Alabama enjoys no status superior to that attributed to a municipal corporation in *Hunter. See Alexander v. State ex rel Carver,* 150 So.2d 204, 206 (Ala.1963). Similarly, the former Fifth Circuit has stated that

> it has been apparent that public entities which are political subdivisions of states do not possess constitutional rights . . . in the same sense as corporations or individuals. . . . . Such entities are creatures of the state and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state.

City of Safety Harbor v. Birchfield, 529 F.2d 1251, 1254 (5th Cir. 1976) (citations omitted).

The specific question of whether the parent state may take property from one of its political subdivisions has apparently not been addressed in this circuit. This question was addressed by the Seventh Circuit in *Commissioners of Highways v. United States,* 653 F.2d 292 (7th Cir. 1981). In this case the United States had condemned property belonging to several Illinois towns to build a canal. A condemnation decree was entered imposing the duty to maintain bridges over the canal as compensation for the taking. The State of Illinois later assumed all obligations of the United States concerning the canal. The court stated that the towns had no action against the state to enforce the condemnation decrees because the state could have taken the property originally without paying compensa-

tion: "Nothing in the United States Constitution prohibits the State from taking its creatures property without providing compensation." 653 F.2d at 297. *See also City of Boston v. Massachusetts Port Authority,* 441 F.2d 167 (1st Cir. 1971) (city has no constitutional right to compensation against state agency operating airport for inverse condemnation of city school due to aircraft overflight); *Jefferson Township v. City of West Carrolton,* 517 F.Supp. 417 (S.D. Ohio 1981).

The county's reliance on *Oklahoma v. Atchison Co.,* 313 U.S. 508, 61 S.Ct. 1050 (1940); *City of Davenport v. Three-fifths Acres,* 252 F.2d 354 (7th Cir. 1958); and, *Wayne County, Kentucky v. United States,* 53 Ct. Cl. 417 (1917), *aff'd,* 232 U.S. 574, 40 S.Ct. 394 (1919), is misplaced. These cases stand for the proposition that compensation is required when the federal government takes public property from a state or state subdivision. They say nothing about the relationship between a state and its own political subdivisions.

Moreover, in instances where county and state interests are at odds, the county cannot stand as *parens patriae* to assert any federal constitutional right. After all, the county citizens are also citizens of the parent state. *See City of Safety Harbor v. Birchfield,* 529 F.2d at 1256 n.7.

The county also seeks to establish a section 1983 protected right to compensation under the Federal Power Act, 16 U.S.C.A. §§ 791a-828c. The act makes utilities holding licenses from the Federal Power Commission "liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works . . . constructed under the license." 16 U.S.C.A. § 803(c). This provision has been construed as establishing merely that the operation of the act does extend to the extinguishment of state law property rights without remuneration — that is, the act does not excuse a federal licensee from paying compensation for damages that their projects inflict on property interests recognized under state law. *Henry Ford & Son v. Little Falls Fibre Co.,* 280 U.S. 369, 50 S.Ct. 140 (1930). The Federal Power Act does not create or confer any substantive rights under section 1983 be-

tween a county and its state. The act does not abrogate the well-established principle that a county does not have any federal constitutional rights which may be invoked against the parent state.

* * * * * *

Accordingly, for the reasons stated above, it is hereby ORDERED:

(1) That the motion for summary judgment filed by defendant Alabama Power Company be and it is hereby granted as to the claims advanced by plaintiff Randolph County, Alabama under 42 U.S.C.A. § 1983; and

(2) That said motion be and it is hereby denied in all other respects.

DONE, this the 10th day of November, 1983.

/s/ MYRON H. THOMPSON

United States District Judge

APPENDIX D

DISTRICT COURT'S ORDER OF MARCH 1, 1984, AMENDING ORDER CONCERNING §1983 COUNT

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

RANDOLPH COUNTY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 81-119-E
ALABAMA POWER COMPANY,	)	
	)	
Defendant.	)	

ORDER

Upon consideration of the defendant's December 30, 1983, motion to abstain and to certify questions of law to the Alabama Supreme Court and motion for reconsideration, it is ORDERED that the motions be and they are hereby denied.

Furthermore and for good cause, it is ORDERED that the November 10, 1983, order of the court, the second paragraph on page three, be and it is hereby amended to read as follows:

A. Claim Under Section 1983

As already noted, the county's section 1983 claim is that APCO, by its fraud, took roads and bridges belonging to the county and its citizens without paying just compensation in violation of the fifth and fourteenth amendments to the U. S. Constitution. Two elements are necessary to a cause of action under section 1983: (1) that the conduct complained of deprived a person of rights secured by the United States Constitution or federal statute; and (2) that said conduct was committed by one acting "under color of

state law." *Lugar v. Edmondson Oil Co., Inc.*, ____ U.S. ____, ____, 102 S.Ct. 2744, 2750-51 (1982); *Morrison v. Washington County, Alabama*, 700 F.2d 678, 682 (11th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 195 (1983). The right asserted to establish the first element is the due process clause. Because the due process clause protects individuals only from governmental and not from private action, the county has to demonstrate that the conduct complained of was achieved by "state action." *Lugar v. Edmonson Oil Co., Inc.*, ____ U.S. at ____, 102 S.Ct. at 2750. The court assumes without deciding that APCO's conduct constituted state action. The issue then becomes whether the county has any federally protected right against state action that takes public property from the county without paying compensation. It does not. A county is purely a creature of its state and, as such, is generally subject to the authority of the state unbridled by the U. S. constitution.

DONE, this the 1st day of March, 1984.

/s/ MYRON H. THOMPSON

United States District Judge

APPENDIX E

LIST OF ROADS AND BRIDGES IN RANDOLPH COUNTY WHICH APCo CONDEMNED AND FLOODED

COST FIGURES FOR FUNCTIONALLY EQUIVALENT OR SUBSTITUTE FACILITY

	Project	1974 Cost	1969 Cost	Actual Cost If Rebuilt
1.(a)	Lonnie White (long bridge)	$3,784,523.81	$1,854,416.69	
(b)	Lonnie White (short bridge)	2,383,248.90	1,167,792.00	
2.	Luther Rice Road	179,423.81	87,917.67	$ 200,000.00
3.	Jim Hunter Road	23,280.01	11,407.21	39,110.42
4.	New Harmony Road and Bridge	1,100,512.38	539,251.07	
5.	Foster's Bridge	422,618.57	207,083.10	418,500.00
6.	Rosie Hill Road and Bridge	662,829.24	324,786.33	343,586.28
7.	Less Bridge	521,124.78	255,351.15	537,600.00
8.	Ketchepedrakee Creek Bridge	84,632.82	41,470.08	
9.	Walter Bartlett Farm Road	65,733.11	32,209.22	
10.	Island Ford Road and Bridge	2,342,317.26	1,147,735.47	
11.	Below Blakes Ferry Road	Not available	Not available	
12.	Above 48 and Below White Road	Not available	Not available	
	Total Damages including (Lonnie White Long Bridge)	$9,186,995.79	$4,501,627.99	$1,538,796.70
	Total Damages including (Lonnie White Short Bridge)	$7,785,720.88	$3,815,003.30	$1,538,796.70